

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1 ) Case No. CV 12-6504 SC  
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10 ) ORDER GRANTING IN PART AND  
11 ) DENYING IN PART MOTION TO  
12 ) DISMISS  
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THE FLOREY INSTITUTE OF )  
NEUROSCIENCE AND MENTAL HEALTH, )  
Plaintiff, )  
v. )  
KLEINER PERKINS CAUFIELD & )  
BYERS, DOMAIN ASSOCIATES LLC, )  
SEARS CAPITAL MANAGEMENT, CAXTON )  
ADVANTAGE VENTURE PARTNERS LP, )  
STANLEY E. ABEL, AND PETER M. )  
BREINING, )  
Defendants. )  
\_\_\_\_\_  
Now before the Court is the above-captioned Defendants' motion  
to dismiss Plaintiff the Florey Institute of Neuroscience and  
Mental Health's ("Plaintiff") complaint. ECF Nos. 1 ("Compl."), 30  
("MTD"). The motion is fully briefed. ECF Nos. 32 ("Opp'n"), 35  
("Reply"), 39-1 ("Surreply"). The Court finds the matter  
appropriate for resolution without oral argument. Civ. L.R. 7-  
1 (b).  
The Court GRANTS Defendants' request for judicial notice

1 ("RJN"), ECF No. 31, under Federal Rule of Evidence 201, and takes  
2 under advisement Plaintiff's response to the RJN, ECF No. 34. In  
3 that document, Plaintiff makes clear that it does not object to the  
4 Court's granting Defendants' request but reserves its right to  
5 object to the documents later, under other Rules of Evidence.

6 As discussed below, the Court GRANTS in part and DENIES in  
7 part Defendants' motion to dismiss.

8

9 **II. BACKGROUND**

10 Plaintiff is an Australian brain research organization.  
11 Compl. ¶¶ 1-3, 12. Plaintiff conducts extensive research into  
12 relaxin, a naturally occurring peptide whose many uses include  
13 treating acute heart failure. See id. ¶¶ 5, 9. Though it  
14 possesses intellectual property and know-how concerning relaxin's  
15 pharmaceutical applications, Plaintiff itself does not  
16 commercialize relaxin. See id. at ¶¶ 9-11. Instead, it partners  
17 with outside firms that seek to do so. These firms tend to pay  
18 Plaintiff for the use of its know-how and other intellectual  
19 property.

20 In 1982, Plaintiff partnered with Genentech, Inc. to share  
21 know-how, materials, and funding. Id. ¶¶ 24-25. In a contract,  
22 the "1982 Agreement," Genentech agreed to pay Plaintiff royalties  
23 on the proceeds of the net sales price of any relaxin-related  
24 products, and a third of any other payments Genentech received for  
25 sublicensing related to Plaintiff's technology. Id. ¶ 25. Between  
26 1982 and 1987, Plaintiff and Genentech worked closely to solve  
27 difficult problems in recombinant DNA technology relating to  
28 relaxin's commercial production. Id. ¶¶ 24-26. In 1987, Genentech

1 and Plaintiff re-executed an amended agreement (the "1987  
2 Agreement") that added a term granting Plaintiff payments in the  
3 event of a successful clinical trial. Id. ¶ 27.

4 In 1993, Genentech established a separate entity that became  
5 Connectics Corporation ("CNCT"), which would continue work on the  
6 relaxin project, and to which Genentech would provide an exclusive  
7 sublicense of Plaintiff's technology. Id. ¶ 28. Plaintiff granted  
8 Genentech permission to do so, resulting in a 1993 sublicensing  
9 agreement from Genentech to CNCT (the "1993 Sublicense"). Id. ¶  
10 29. In 1994 that agreement was replaced by an amendment that  
11 granted Genentech the right to receive royalties on any licensed  
12 product sales by CNCT, and CNCT in turn agreed to pay Plaintiff  
13 royalties and other payments that would be due from Genentech per  
14 the 1982 Agreement. Id. ¶ 30.

15 In 1995, CNCT told Plaintiff that it wanted to enter a new  
16 research agreement. Id. ¶ 31. Genentech granted Plaintiff  
17 authority to negotiate an amendment to the 1987 Agreement directly  
18 with CNCT. Id. CNCT wanted to reduce the royalty rate under that  
19 agreement, because it believed the high rate would deter corporate  
20 partners, so it proposed reducing the royalty rate and adding terms  
21 that would give Plaintiff a share of future up-front and milestone  
22 payments paid by CNCT's future drug-development partners. Id.  
23 Such partners would be necessary for this project, since CNCT was  
24 too small to develop and commercialize relaxin by itself. Id. ¶  
25 32.

26 CNCT and Plaintiff negotiated between 1995 and 1998. Id. ¶¶  
27 32-34. Plaintiff alleges that during these negotiations, it was  
28 concerned that CNCT might try to avoid future payment obligations

1 to structure future drug-development agreements in a way that would  
2 allow it to avoid having to pay Plaintiff. Id. ¶ 34. For example,  
3 Plaintiff states that it feared the possibility of CNCT structuring  
4 a partnership deal in a way that would allow a drug-development  
5 partner to pay CNCT for the use of Plaintiff's IP and know-how  
6 without falling under the term of the agreement that would require  
7 CNCT to give Plaintiff a portion of those payments. Id. CNCT's  
8 CEO apparently told Plaintiff that its concerns were unfounded and  
9 that it would never do such a thing, so Plaintiff agreed to enter a  
10 new research agreement with CNCT. Id.; Defs.' RJN Ex. A ("1998  
11 Agreement").

12 The new agreement reduced Plaintiff's royalties, granted CNCT  
13 a license to Plaintiff's IP and know-how, and required CNCT to pay  
14 Plaintiff 3 percent of the future net sales of a relaxin-based  
15 product, 1 percent of up-front payments from drug-development  
16 partners, and 15 percent of development milestone payments from its  
17 "Partner," defined as "a third party who has entered into an  
18 agreement with CNCT for the manufacture, use or sale of a Licensed  
19 Product," with "Licensed Product" referring to relaxin-based  
20 products. Id. ¶ 36; 1998 Agreement ¶ 1.3. Between 1998 and 2001,  
21 CNCT entered various sublicensing agreements with drug-development  
22 partners that were seeking to develop relaxin for the treatment of  
23 scleroderma, an autoimmune disease, and it paid Plaintiff the  
24 required up-front and milestone fees associated with those  
25 development programs. Id. ¶¶ 37-39. In 2001, CNCT ceased its  
26 development efforts after its clinical trials for scleroderma were  
27 deemed unsuccessful, and in 2002, its relaxin team established a  
28 new commercial entity, Corthera (then called BAS Medical, Inc.).

1       In 2003, Defendants Kleiner Perkins and Breining, a Corthera  
2 founder, approached Plaintiff to seek assignment of the relaxin-  
3 related license from CNCT to Corthera. Id. ¶ 41. In 2003,  
4 Corthera negotiated an amendment to the 1998 Agreement that  
5 extended the agreement's terms, permitted assignment of CNCT's  
6 rights and obligations under the 1998 Agreement to Corthera, and  
7 further reduced Plaintiff's royalty rates to 2 percent of net  
8 sales. Id. ¶¶ 42-44; Defs.' RJD Ex. B ("2003 Agreement"). The 1  
9 percent up-front payments and 15 percent milestone payments,  
10 described in the 1998 Agreement, would remain the same. Id.  
11 Corthera's rationale for negotiating these changes was the same as  
12 CNCT's: it was too small to commercialize relaxin itself, so it  
13 needed to license Plaintiff's IP and know-how to a bigger partner,  
14 which might balk at the royalty payments -- thus the change in  
15 payment terms. See id.

16       From 2003 through 2009, Plaintiff and Corthera collaborated on  
17 relaxin research. Id. ¶¶ 45-49. In 2007, Defendants Kleiner  
18 Perkins and other yet-unknown defendants -- funders and board  
19 members of Corthera -- recruited Defendant Abel as CEO of Corthera,  
20 and Corthera switched its relaxin focus to cardiovascular  
21 treatment. Id. ¶ 46. In 2008, Defendant Abel told Plaintiff that  
22 he thought Corthera could grow into a public company if it could  
23 partner with a drug-development company to take a relaxin-based  
24 cardiac treatment program through phase III clinical trials. Id. ¶  
25 47. Corthera completed its phase II clinical trials in March 2009  
26 and initiated phase III clinical trials in October 2009. Id. ¶ 48.

27       The following facts go to the core of Plaintiff's complaint.  
28 In December 2009, Plaintiff learned from a press release that the

1 pharmaceutical company Novartis had agreed to purchase Corthera up-  
2 front for \$120 million in cash, characterized as a stock-purchase  
3 agreement that would leave Corthera as a wholly owned subsidiary of  
4 Novartis. Id. ¶ 49; Defs.' RJN Ex. D ("Press Release"); see also  
5 Defs.' RJN Exs. C ("Merger Agreement"), E ("Merger Certificate").  
6 Corthera had apparently not given Plaintiff notice of the sale or  
7 provided it with documentation related to the sale or any putative  
8 assignments of rights in Plaintiff's IP. Id.

9 According to the press release through which Plaintiff learned  
10 of the sale, Novartis would pay Corthera's shareholders up to \$500  
11 million in milestone payments related to relaxin commercialization,  
12 as well as up-front payments. Id. ¶¶ 49, 52-53. The Merger  
13 Agreement confirms this. It sets out six milestone payments to be  
14 made from Novartis to Corthera's shareholders, contingent on  
15 Corthera and Novartis's using diligent efforts to achieve the  
16 milestone events. Merger Agreement ¶¶ 9.1-9.3. The merger made  
17 Corthera a wholly owned subsidiary of Novartis and converted all  
18 existing Corthera stock to cash and contingent rights to receive  
19 additional cash based on those milestone payments. Compl. ¶ 49;  
20 Defs.' RJN Ex. E.

21 The key language from the original 1998 Agreement, as amended  
22 by the 2003 Agreement, is as follows:

23 5.2. Revenue Received from Partners  
24 (a) CNCT shall pay [Plaintiff] one  
25 percent (1%) of Up-front Payments  
26 [defined as payments "from a Partner in  
the nature of a one-time license fee,  
option fee or like payment on account  
of the grant by CNCT . . . of a license  
. . . to manufacture, use or sell  
Relaxin . . . ."]  
27 (b) CNCT shall pay [Plaintiff] fifteen  
28 percent (15%) of the Net Revenues, if

any: (i) from payments received by CNCT from a Partner for the achievement of key development milestones (e.g., initiation of Phase III studies, BLA filing and approval) for Licensed Products . . . .

1998 Agreement ¶¶ 1.5, 5.2; 2003 Agreement ¶ 5.2(b).

The 2009 press release also apparently stated that Novartis bought Corthera so it could acquire rights to Plaintiff's relaxin IP, so that Novartis could develop and commercialize relaxin. Id. ¶ 49. At the time of the acquisition, Defendants Kleiner Perkins, Domain Associates, Sears Capital, and Breining were on Corthera's board, and Defendant Abel was Corthera's CEO. Id. ¶ 51.

Plaintiff states that it does not know at this stage whether Novartis has made any payments under the Merger Agreement. Id. ¶ 55. However, it alleges that in September 2011, Novartis and Corthera indicated that they would not pay Plaintiff any portion of the payments Novartis might make under its agreement with Corthera, and on September 26, 2012, Novartis announced successful results from phase III clinical studies of relaxin's application to patients with acute heart failure. Id. ¶¶ 54-56. This apparently suggests to Plaintiff that Novartis used Plaintiff's IP and know-how without a license.

The crux of Plaintiff's complaint is that the fears it expressed during its 1995-98 negotiations with CNCT have been realized: CNCT, now Corthera, structured an agreement with a drug-development partner in a way that allowed the partner to use Plaintiff's IP and know-how without having to make any payments to Plaintiff. Based on the facts described above, Plaintiff asserts four causes of action against Defendants: (1) conversion, (2) misappropriation, (3) unjust enrichment, and (4) constructive trust

1 under California Civil Code sections 2223 and 2224. Defendants now  
2 move to dismiss.

3

4 **III. LEGAL STANDARD**

5 A motion to dismiss under Federal Rule of Civil Procedure  
6 12(b) (6) "tests the legal sufficiency of a claim." Navarro v.  
7 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
8 on the lack of a cognizable legal theory or the absence of  
9 sufficient facts alleged under a cognizable legal theory."  
10 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
11 1988). "When there are well-pleaded factual allegations, a court  
12 should assume their veracity and then determine whether they  
13 plausibly give rise to an entitlement to relief." Ashcroft v.  
14 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court  
15 must accept as true all of the allegations contained in a complaint  
16 is inapplicable to legal conclusions. Threadbare recitals of the  
17 elements of a cause of action, supported by mere conclusory  
18 statements, do not suffice." Id. (citing Bell Atl. Corp. v.  
19 Twombly, 550 U.S. 544, 555 (2007)). The court's review is  
20 generally "limited to the complaint, materials incorporated into  
21 the complaint by reference, and matters of which the court may take  
22 judicial notice." Metzler Inv. GMBH v. Corinthian Colls., Inc.,  
23 540 F.3d 1049, 1061 (9th Cir. 2008) (citing Tellabs, Inc. v. Makor  
24 Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

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28 **IV. DISCUSSION**

1                   **A. Alter Ego**

2                   Defendants' motion to dismiss raises an alter ego theory:  
3 Plaintiff's complaint fails because it is trying to hold a  
4 corporation's former stockholders liable for the corporation's  
5 alleged acts. See MTD at 8-14.

6                   "Ordinarily, a corporation is regarded as a legal entity  
7 separate and distinct from its stockholders, officers and  
8 directors. Under the alter ego doctrine, however, where a  
9 corporation is used by an individual or individuals, or by another  
10 corporation, to perpetrate fraud, circumvent a statute, or  
11 accomplish some other wrongful or inequitable purpose, a court may  
12 disregard the corporate entity and treat the corporation's acts as  
13 if they were done by the persons actually controlling the  
14 corporation." Robbins v. Blecher, 52 Cal. App. 4th 886, 892 (Cal.  
15 Ct. App. 1997). "Shareholders of a corporation are not normally  
16 liable for its torts, but personal liability may attach to them  
17 through application of the 'alter ego' doctrine . . . , or when the  
18 shareholder specifically directed or authorized the wrongful acts."  
19 Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 785 (Cal. 1979).

20                   Defendants contend that Plaintiff fails to pierce the  
21 corporate veil using the alter ego theory. MTD at 9-11. The  
22 problem with this argument is that Plaintiff has alleged that  
23 Defendants specifically directed or authorized the torts in  
24 question here. See Opp'n at 21-23; see also PMC, Inc. v. Kadisha,  
25 78 Cal. App. 4th 1368, 1382 (Cal. Ct. App. 2000) (shareholders and  
26 directors can be held liable alongside corporations if they are  
27 shown to have participated in an intentional tort). Defendants'  
28 insistence that Plaintiff fails to plead an alter ego theory is

1 therefore irrelevant. It is not the theory on which Plaintiff  
2 relies in naming Defendants in its complaint. Defendants contend  
3 that Plaintiff's pleadings are conclusory on this point, Reply at  
4 8-9, but the Court finds that Plaintiff has pled enough to survive  
5 a motion to dismiss on these grounds, since their claims as to  
6 Defendants' actions are particular and plausible enough to meet the  
7 standards of Rule 8, Twombly, and Iqbal. See Compl. ¶¶ 41-42, 47,  
8 51-53 (describing specific Defendants' actions in relation to  
9 Novartis's acquisition of Corthera and their knowledge of  
10 Plaintiff's property and contracts).

11 Defendants counter that even this theory must fail because  
12 Plaintiff is seeking to hold Defendants liable for Corthera's  
13 contractual obligations. This argument is inappropriate at this  
14 stage. Contracts may underlie Plaintiff's claims, but Plaintiff is  
15 not exactly saying that Corthera should have paid Plaintiff --  
16 Plaintiff is saying that Defendants' actions were constructed  
17 specifically to preempt those contractual payments and to divert  
18 future payments to Defendants.

19 Accordingly, at this point, the Court cannot find as a matter  
20 of law that Plaintiff's claim should be dismissed for failure to  
21 plead alter ego.

22 **B. Assignment**

23 The parties also dispute whether Novartis's merger with  
24 Corthera transferred Corthera's licenses of Plaintiff's IP and  
25 know-how to Novartis. According to Defendants, if Corthera remains  
26 licensee of Plaintiff's IP and know-how, no property or interest in  
27 property could have been converted or misappropriated. Reply at 5-  
28 7. Plaintiff contends that as a result of Novartis's merger with

1 Corthera, Novartis assumed Corthera's license agreement with  
2 Plaintiff, because the merger alone effected a legal transfer or  
3 Corthera's rights to Novartis without Plaintiff's permission.  
4 Surreply at 3 (citing SQL Solutions, Inc. v. Oracle Corp., No. C-  
5 91-1079 MHP, 1991 WL 626458 (N.D. Cal. Dec. 18, 1991)).

6 Novartis's merger with Corthera was structured as a "reverse  
7 triangular merger," in which the acquisition target survives the  
8 merger intact, as a wholly-owned subsidiary of the acquiring  
9 corporation, instead of being merged into a corporation or a  
10 separate subsidiary as in a standard "forward merger." See 2  
11 Ballentine & Sterling, California Corporation Laws 12-15 (4th ed.  
12 2003).

13 In a reverse triangular merger, the target corporation  
14 continues to own its assets even though the acquiring corporation  
15 owns all of the target's stock. As Plaintiff notes, however, the  
16 Court has found in the past that reverse triangular mergers result  
17 in the transference of the acquired company's rights, by law, to  
18 the acquiring company. SQL Solutions, 1991 WL 626458, at \*3-4.  
19 The reasoning in SQL was based in part on Trubowitch v. Riverbank  
20 Canning Co., 30 Cal. 2d 335, 344-45 (Cal. 1947), which held that  
21 "if an assignment results merely from a change in the legal form of  
22 ownership of a business, its validity depends upon whether it  
23 affects the interests of the parties protected by the  
24 nonassignability of the contract." No other cases have analyzed  
25 this issue.

26 Defendants are correct that there was no assignment, but not  
27 for the reasons they gave. See Reply at 5-6 (citing, among other  
28 things, inapposite Delaware cases). Under California law,

1 Trubowitch is the controlling precedent on this matter, and its  
2 rule is conditional: "if an assignment results merely from a change  
3 in the legal form of ownership of a business, its validity depends  
4 upon whether it affects the interests of the parties protected by  
5 the nonassignability of the contract." 30 Cal. 2d at 344-45. This  
6 means that for a court to assess the validity of a purported  
7 assignment, there must first have been an assignment by virtue of a  
8 business's change in legal form of ownership. While such an  
9 assignment would probably affect Plaintiff's interests under the  
10 nonassignment clause, it is entirely unclear as to whether a  
11 reverse triangular merger actually effects an assignment of a  
12 target corporation's assets.

13 No California state court has resolved this matter, and the  
14 Court is not inclined to guess at possible conclusions. The Court  
15 therefore begins from the presumption that a reverse triangular  
16 merger, which leaves intact the acquired corporation, does not  
17 effect a transfer of rights from the wholly owned subsidiary to its  
18 acquirer as a matter of law. What little applicable law there is  
19 could be analogized from California cases on stock sales, like  
20 Farmland Irrigation Co. v. Dopplmaier, 48 Cal. 2d 208, 223 (Cal.  
21 1957), which suggested that if a plaintiff had sold all of his  
22 stock in a corporation, there could be no contention that the  
23 corporation's licenses would be extinguished as a matter of law,  
24 since the two contracting parties were still extant and in privity.

25 Plaintiff relies solely on SQL Solutions to argue that  
26 assignment occurred as a matter of law when an acquired corporation  
27 became another corporation's wholly owned subsidiary. That case  
28 did not analyze nonassignment clauses and also found that federal

1 copyright law forbid transfer. 1991 WL 626458, at \*5. In any  
2 event, on this point the Court is bound by the California Supreme  
3 Court's longstanding decision from Trubowitch. Accordingly, the  
4 Court finds that Corthera, Novartis's wholly owned subsidiary,  
5 remains licensee of Plaintiff's IP and know-how.

6 **C. Conversion**

7 The elements of a claim for conversion are (1) ownership or  
8 right to possession of property, (2) wrongful disposition of the  
9 property right, and (3) damages. Kremen v. Cohen, 337 F.3d 1024,  
10 1029 (9th Cir. 2003). A plaintiff need not have legal ownership or  
11 absolute ownership of the property. Messerall v. Fulwider, 199  
12 Cal. App. 3d 1324, 1329 (Cal. Ct. App. 1988). It need only allege  
13 that it is entitled to immediate possession of the property at the  
14 time of conversion. Bastanchury v. Times-Mirror Co., 68 Cal. App.  
15 2d 217, 236 (Cal. Ct. App. 1954). However, a mere contractual  
16 right of payment, without more, will not suffice to state a claim  
17 for conversion. Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445,  
18 452 (Cal. Ct. App. 1997).

19 If, however, "there is a specific, identifiable sum involved,  
20 such as where an agent accepts a sum of money to be paid to another  
21 and fails to make the payment," a cause of action for conversion  
22 exists. Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1066 (Cal Ct.  
23 App. 1998). If money is not specifically identified, then the  
24 proper action is in contract or for debt. Baxter v. King, 81 Cal.  
25 App. 192, 194 (Cal. Ct. App. 1927).

26 Plaintiff's conversion claim critically fails to distinguish  
27 what Defendants converted: intellectual property, know-how, payment  
28 rights, or something else. So far as Plaintiff pleads that

1 Defendants converted Plaintiff's intellectual property rights,  
2 Plaintiff's conversion claim fails because Plaintiff has not  
3 plausibly alleged that Defendants themselves wrongly disposed of  
4 the rights in question. Plaintiff's pleadings and arguments  
5 suggest that Novartis obtained access to the intellectual property  
6 rights that Corthera licensed from Plaintiff, but nothing in  
7 Plaintiff's complaint states that Defendants themselves -- as  
8 opposed to Corthera or Novartis -- managed to dispose of  
9 Plaintiff's intellectual property. In any event, no assignment  
10 took place, so if any wrongful disposition of a property right  
11 occurred, its remedy would appear to lie against Corthera or  
12 Novartis in contract or under state and federal intellectual  
13 property laws, because, Plaintiff has failed to allege how  
14 Defendants actually caused Plaintiff's IP or know-how to be  
15 converted.

16 If Plaintiff is arguing that Defendants wrongfully disposed of  
17 Plaintiff's right to be paid under a contract, no conversion claim  
18 can lie for that. According to the 1998 and 2003 Agreements,  
19 Plaintiff was to be paid if Corthera entered a partnership deal,  
20 but Corthera's merger and acquisition was not such a transaction.  
21 Plaintiff has therefore not pled that it was entitled to the  
22 payments it claims Novartis made to Corthera. They fall outside  
23 the contracts that govern those parties' relationships, and  
24 Plaintiff has not adequately alleged that any payment was  
25 specifically being sent to Plaintiff.

26 In any event, the money at the center of Plaintiff's claim is  
27 not quite the "contractual right of payment" that California law  
28 generally forbids as the predicate for a conversion claim, but it

1 is also not a plausible enough basis to support this cause of  
2 action. Plaintiff's allegations on this point are simply too vague  
3 and attenuated. Moreover, Plaintiff has not pled enough to show  
4 that an equitable lien was created at any point, since it is not  
5 clear from Plaintiff's pleadings that Defendants themselves  
6 promised Plaintiff anything. See Cnty. of L.A. v. Constr. Laborers  
7 Trust Funds for S. Cal. Admin. Co., 137 Cal. App. 4th 410, 414  
8 (Cal. Ct. App. 2006) (equitable lien created by oral agreement  
9 where defendants were aware of reliance by plaintiff of promise of  
10 payment in exchange for work).

11 Plaintiff's conversion claim is DISMISSED with leave to amend,  
12 to allow Plaintiff to plead a more precise and plausible claim.

13 **D. Misappropriation**

14 Plaintiff's misappropriation claim fails for the same reason  
15 as its conversion claim.<sup>1</sup> Plaintiff's allegations simply do not  
16 support the charge that Defendants actually appropriated and used  
17 Plaintiff's property. The claim is so attenuated that it fails to  
18 be plausible, and it fails to make clear exactly what Defendants --  
19 as opposed to some other party -- took or misused, whether IP,  
20 know-how, payment, or something else.

21 If anyone actually appropriated or used Plaintiff's  
22 intellectual property and know-how, Plaintiff's pleadings seem to  
23 point more to Corthera or Novartis. If Defendants are being paid  
24 for Corthera's up-front payments and milestones, then apparently  
25

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26 <sup>1</sup> The Court declines to entertain the parties' arguments about  
27 preemption at this point. It is not clear that any preemption  
28 argument would be relevant to the tort claims Plaintiff makes,  
which do not rely solely on intellectual property claims. In any  
event, Defendants raise the issue only in a footnote, a tactic both  
parties decry at different turns.

1 Corthera is partnering with someone and is therefore breaching the  
2 terms of its contracts with Plaintiff, or Novartis is infringing  
3 some property right. Plaintiff has not made clear why Defendants  
4 should be held liable for that by virtue of a merger, even if  
5 Plaintiff does allege that Defendants structured the sale to  
6 benefit themselves at Plaintiff's expense. This claim is DISMISSED  
7 with leave to amend for the same reasons as Plaintiff's conversion  
8 claim.

9 **E. Unjust Enrichment**

10 Plaintiff also brings a claim for unjust enrichment or quasi-  
11 contract, the elements of which are (1) a defendant's receipt of a  
12 benefit and (2) unjust retention of that benefit at the plaintiff's  
13 expense. Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 1593  
14 (Cal. Ct. App. 2008). Unjust enrichment is an equitable claim that  
15 sounds in implied or quasi-contract. See Paracor Fin., Inc. v.  
16 Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996). "The  
17 doctrine applies where plaintiffs, having no enforceable contract,  
18 nonetheless have conferred a benefit on defendant which defendant  
19 has knowingly accepted under circumstances that make it inequitable  
20 for the defendant to retain the benefit without paying for its  
21 value." Hernandez v. Lopez, 180 Cal. App. 4th 932, 938 (Cal. Ct.  
22 App. 2009).

23 Plaintiff alleges that Defendants knew of Plaintiff's  
24 contracts with Corthera but wanted to use Corthera's future work  
25 with Novartis to enrich themselves instead of Plaintiff. Plaintiff  
26 claims that in order to accomplish this, Defendants set up a merger  
27 between Novartis and Corthera that predicted Novartis having some  
28 form of access to Plaintiff's relaxin IP and know-how, but since

1 the transaction was not technically a "Partnership" per the 1998  
2 and 2003 Agreements, Defendants -- not Plaintiff -- would receive  
3 up-front and milestone payments that could be classified instead as  
4 payments from the Merger Agreement.

5 First, Defendants argue that Plaintiff fails to describe a  
6 "benefit" to which it is entitled, because Corthera, not  
7 Defendants, was the party responsible for making contractual  
8 payments to Plaintiff . MTD at 18. This is not an accurate  
9 statement of Plaintiff's claim. Plaintiff's complaint fully  
10 accounts for the fact that Corthera was responsible for making  
11 payments to Plaintiff in the event of a partnership. See Compl. ¶¶  
12 49, 51-53, 57. The point of Plaintiff's unjust enrichment claim,  
13 however, is that Defendants set up an arrangement that would  
14 essentially work as a partnership between Corthera and Novartis,  
15 but that would be structured in a way that diverted Corthera's  
16 payments from Plaintiff to Defendants.

17 Second, Defendants claim that Plaintiff alleges no facts that  
18 would permit the Court to treat Novartis's payments to Defendants  
19 as benefits allegedly owed to Plaintiff under the 1998 and 2003  
20 Agreements. MTD at 19. This is essentially a restatement of  
21 Defendants' first argument on this point, and it fails for the same  
22 reasons.

23 Third, Defendants argue that Plaintiff's unjust enrichment  
24 claim fails because it is governed by the express terms of a  
25 contract. MTD at 19-20. It is true that no unjust enrichment  
26 claim exists if express agreements define the parties' rights.

27 Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc., 94  
28 Cal. App. 4th 151, 172 (Cal. Ct. App. 2001). But no contract

1 governing payments from Novartis to Defendants exists between  
2 Defendants and Plaintiff, who are the only parties to this action.  
3 That is the point of Plaintiff's unjust enrichment claim, and it is  
4 also the point of the unjust enrichment doctrine. See Hernandez,  
5 180 Cal. App. 4th at 938.

6 Finally, Defendants contend that the Court has previously  
7 disallowed claims for unjust enrichment pled on their own and not  
8 as an alternative avenue of relief. Reply at 14 (citing Colucci v.  
9 ZonePerfect Nutrition Co., No. 12-2907 SC, 2012 WL 6737800, at \*10  
10 (N.D. Cal. Dec. 28, 2012)). That is true, but Plaintiff need not  
11 use the magic word "alternatively" to indicate that its claim was  
12 made in the alternative. See Fed. R. Civ. P. 8; Coleman v.  
13 Standard Life Ins. Co., 288 F. Supp. 2d 1116, 1120 (E.D. Cal. 2003)  
14 ("Under Rule 8, plaintiff need not use particular words to plead in  
15 the alternative as long as it can be reasonably inferred that this  
16 is what [he was] doing.") (internal citations and quotations  
17 omitted). The Court finds that Plaintiff's claim for unjust  
18 enrichment was made in the alternative to its conversion and  
19 misappropriation claims, and declines to dismiss this cause of  
20 action on a technicality.

21 Defendants' motion to dismiss Plaintiff's unjust enrichment  
22 claim is therefore DENIED.

23 **F. Constructive Trust**

24 Plaintiff asserts a cause of action for constructive trust  
25 against Defendants. "A constructive trust is an involuntary  
26 equitable trust created by operation of law as a remedy to compel  
27 the transfer of property from the person wrongfully holding it to  
28 the rightful owner." Burlesci v. Peterson, 68 Cal. App. 4th 1062,

1 1069 (Cal. Ct. App. 1998). It is an equitable remedy to prevent  
2 unjust enrichment. See id.; see also Malfatti v. Mortg. Elec.  
3 Registrations Sys., Inc., No. C 11-03142 WHA, 2011 WL 5975055, at  
4 \*3 (N.D. Cal. Nov. 29, 2011) (constructive trust is a remedy, not a  
5 claim for relief). Defendants move to dismiss the claim on the  
6 grounds that a constructive trust is a remedy, not a claim. MTD at  
7 20-21.

8 The Court agrees with Defendants. Plaintiff's constructive  
9 trust claim must be dismissed because a constructive trust is only  
10 a remedy. Defendants' motion to dismiss Plaintiff's claim for  
11 constructive trust is GRANTED with prejudice, but Plaintiff has  
12 leave to clarify its request for constructive trust as a remedy.  
13

14 **V. CONCLUSION**

15 For the reasons described above, the Court GRANTS in part and  
16 DENIES in part the above-captioned Defendants' motion to dismiss  
17 Plaintiff Florey Institute of Neuroscience and Mental Health's  
18 complaint. Plaintiff's unjust enrichment claim is undisturbed.  
19 All other claims are DISMISSED. Plaintiff has thirty (30) days  
20 from this Order's signature date to file an amended complaint, if  
21 it chooses to do so. Failure to file an amended complaint may  
22 result in the deficient claims being dismissed with prejudice.  
23

24 IT IS SO ORDERED.

25  
26 Dated: September 26, 2013  
27  
28



UNITED STATES DISTRICT JUDGE